No. 20,841

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
DESERT DIET DEVELOPMENT CORPORATION,
Debtor.

DESERT DIET DEVELOPMENT CORPORATION,
Appellant,

vs.

CHARLES W. HERBERT, WALTER T. MOLL, and MELVIN HELLWITZ,
Appellees.

On Appeal from the United States District Court for the District of Arizona

REPLY BRIEF FOR APPELLANT

CLAGUE A. VAN SLYKE,
182 North Court Street,
Tucson, Arizona 85701,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Argument I—Adequate relief	2
Argument II—Drastic relief	2
Comments on appellees' "Conclusion"	3
Conclusion	4

Table of Authorities Cited

Cases

	Page
Reilly v. Clyne, 27 Ariz. 432, 234 Pac. 35	3
Securities and Exchange Commission v. American Trailer Rentals Co., 85 S. Ct. 513, 379 U.S. 594 (1965), 13 L.Ed. 2d 510	2

Statutes

Bankruptcy Act, Chapter X	4

No. 20,841

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
DESERT DIET DEVELOPMENT CORPORATION,
Debtor.

DESERT DIET DEVELOPMENT CORPORATION,
Appellant,

vs.

CHARLES W. HERBERT, WALTER T. MOLL, and MELVIN HELLWITZ,
Appellees.

On Appeal from the United States District Court for the District of Arizona

REPLY BRIEF FOR APPELLANT

The Appellant sets forth below limited comments on the arguments previously made by both the Appellant and Appellees.

ARGUMENT I—ADEQUATE RELIEF

The fact that the petitioners could not file an "involuntary Chapter XI" seems to be the Appellees' ground for argument that the usual tests of "adequate relief" do not apply. No citations were offered in support of the proposition.

The Court is referred again to *Securities and Exchange Commission v. American Trailer Rentals Co.*, 85 S. Ct. 513, 379 U.S. 594 (1965), 13 Law Ed.2d 510 at 516. The Court of Appeals commented,

> "Since the granting of the motion rests in the discretion of the [district] court, while we think it is a borderline case, it does not appear that *the Securities and Exchange Commission* [as the petitioners in the case at Bar] *has shown adequate relief is not obtainable in Chapter XI proceedings.* . . ."

At page 518:

> "Congress has made it quite clear that Chapters X and XI are not alternate routes . . . a Chapter X petition may not be filed unless 'adequate relief' is not obtainable under Chapter XI."

It is the Appellant's contention that the petitioners failed completely in this essential item of proof.

ARGUMENT II—DRASTIC RELIEF

It is the position of the Debtor that the relief requested by the petitioners is *drastic*. To ask that a corporation be completely re-organized to secure

issuance of deeds to land purchasers and to determine if a "profit" is available to distribute to syndicate holders is, in the opinion of counsel, a drastic step. To place this power in the hands of the Court without strict controls seems to be beyond the scope of the authority set forth in those cases cited in the Appellant's Opening Brief.

The Appellees refer to *Reilly v. Clyne,* 27 Ariz. 432, 234 Pac. 35, which would "seem to establish the syndicate investors as *de facto* stockholders". This issue has not been adjudicated and is not before the Court at the present time. The fact cannot be disregarded that the syndicate holders are in fact one and the same with the Stewart Title and Trust Company Trust, which owns the mortgage on the realty in question.

COMMENTS ON APPELLEES' "CONCLUSION"

The Appellees in their "conclusion" on page 11 of their brief refer to the fact that the Debtor corporation, through its counsel, produced no witnesses at the hearings and did not wish to take "advantage of some re-organization proceeding rather than let all its participating parties, their money go down the drain".

The position of the corporation is far from the "conclusion" drawn by the Appellees that the corporation intends to "go down the drain." The corporation is before the Court, protecting its legal rights, and insisting that drastic remedies are being applied to it for which there is no necessity.

The Court's attention is called to Findings of Fact Nos. 7, 8, and 9, which show that the corporation has substantial equity. The corporation feels that the procedure it is following is in the best interests of all parties. The efforts of the Appellees to second guess the corporation appears to be obvious.

CONCLUSION

It is respectfully submitted that under Chapter X of the Bankruptcy Act and the cases as submitted, that the Order of the District Judge and of the Referee be set aside and the involuntary petition filed against the corporation be dismissed.

Dated, Tucson, Arizona,
December 22, 1966.

CLAGUE A. VAN SLYKE,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLAGUE A. VAN SLYKE,
Attorney for Appellant.